IN THE

Supreme Court of the United States

October Term, 1964.

No. 644.

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

CONTINENTAL OIL COMPANY, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR PETITIONER, THE UNITED GAS IMPROVEMENT COMPANY.

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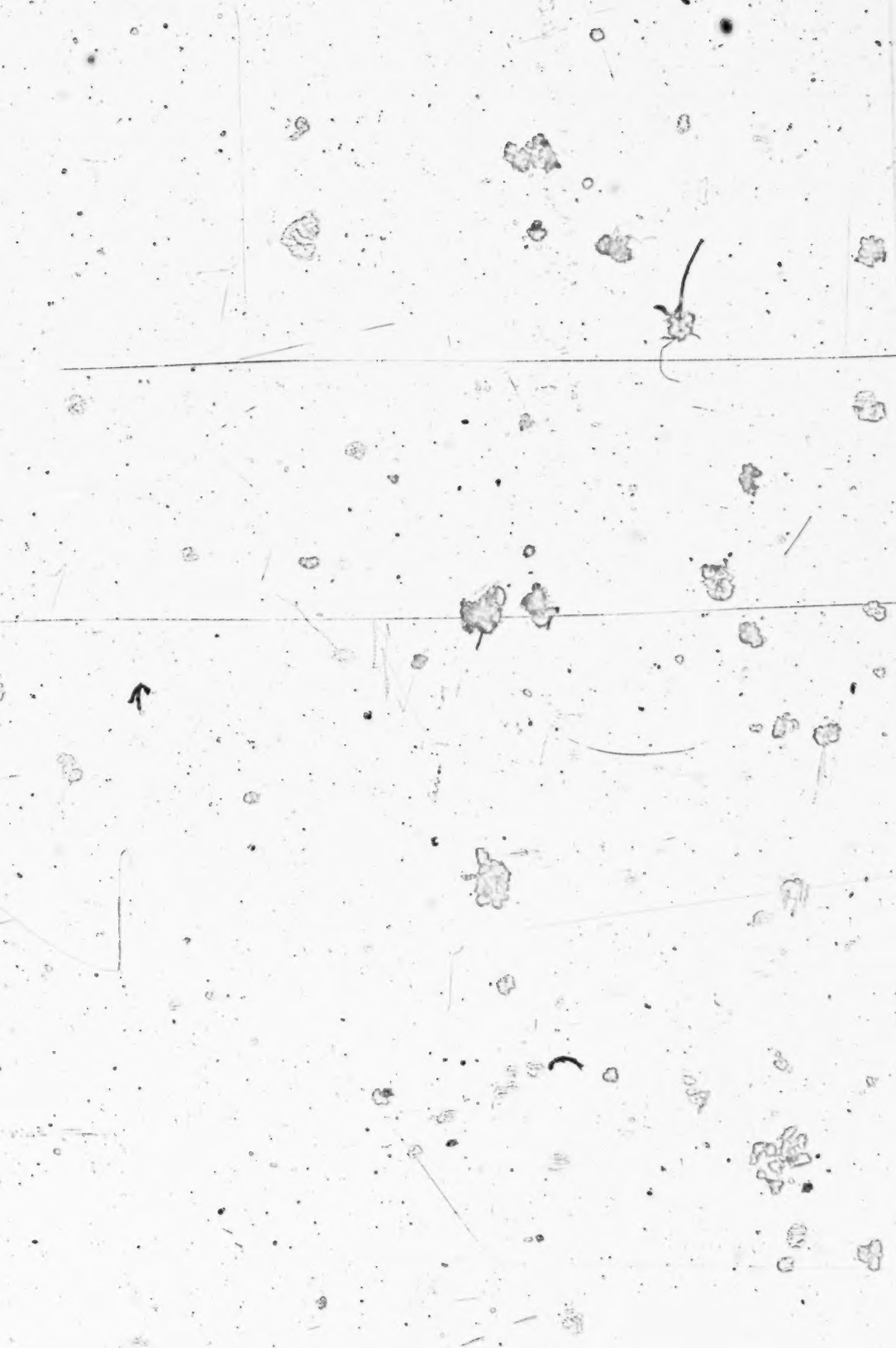

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ABBREVIATIONS

The following abbreviations of names are used in this Reply Brief:

Abbreviation	*Refers To*
Continental	Respondent Continental Oil Company
Commission	The Federal Power Commission, Petitioner in No. 693
New York Commission	The Public Service Commission of the State of New York
Petitioner	Petitioner The United Gas Improvement Company
Texas Eastern	Respondent Texas Eastern Transmission Corporation

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ARGUMENT.

I. Introduction.

Two issues raised by respondents herein in their brief will be considered in this reply: The first is a contention by respondents, involving statutory construction and raised for the first time by respondents in their brief to this Court, that the term "natural gas" used in Section 1(b) of the Natural Gas Act, 15 U. S. C. § 717(b), does not comprehend gas in a state of nature in the ground. The second contention concerns the effect to be given the decision of the Court of Appeals for the District of Columbia rendered at an earlier stage in the present proceeding. Both contentions of respondents are without substance.

II. The Meaning of "Natural Gas" in the Statutory Phrase "A Sale of Natural Gas In Interstate Commerce For Resale" Contained in 15 U. S. C. § 717(b).

A. The Issue Is Not Properly Before This Court.

At the outset, it must be noted that § 19(b) of the Natural Gas Act provides:

> "No objection to the order of the Commission shall be considered by the [reviewing] court unless such objection shall have been urged before the Commission in the application for rehearing . . ." 15 U. S. C. 717r(b).

While the Applications for Rehearing of the various respondents raised innumerable objections to the Commission's Opinions 378 and 378A they nowhere raised the issue of statutory construction now raised for the first time in their brief to this Court. Compare Continental's "Application for Rehearing" (R. 1024-25, at 1037) in which the term "natural gas" is discussed at some length, but only in the context of attempting to show the Commission that "natural gas" is not an incorporeal interest in real estate.

It has been held that "the presentation of a ground of objection in an application for rehearing is an *indispensable prerequisite* to the exercise of power of judicial review of the order on such ground." *Pan American Petroleum Corp. v. FPC*, 268 F. 2d 827, 830 (10th Cir. 1959) (Italics added); *FPC v. Colorado Interstate Gas Co.*, 348 U. S. 492. Therefore, respondents are foreclosed from now raising this novel ground based on statutory construction.

B. The Construction Sought by Respondents Is Erroneous.

In any event, the strained and limited construction of the term "natural gas" sought by respondents has no basis in the Act or in cases construing the Act.[1] The term as used in the Act, however, *has* been authoritatively construed by the Court of Appeals for the Fifth Circuit. *Deep South Oil Co. v. FPC*, 247 F. 2d 822, 888 (5th Cir. 1957), *cert. denied sub nom., Humble Oil & Ref. Co. v. FPC*, 355 U. S. 930 (1958). The court there specifically rejected a contention essentially similar to respondents' that the phrase "natural gas" comprehended only the commodities methane and ethane which are generally transported and ultimately sold in interstate commerce. In its sworn Application for Rehearing of Opinion No. 378 (R. 1013-89) respondent Continental adopted the definition found in the *Deep South* opinion, stating:

> "The *normal meaning* of 'natural gas' has been held to be 'a mixture of gaseous hydrocarbons *found in nature*' [citing *Deep South, supra*]." (R. 1024) (Italics added.)

Petitioner also accepts that definition and points out that it clearly includes the gaseous hydrocarbons found in nature and sold as "gas in place" (R. 426) by respondent Continental and the other producer-respondents herein. Therefore these sales clearly fall within the Commission's jurisdiction over "sales of natural gas in interstate commerce for resale" under § 1(b) of the Act.

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1. The opinions of this Court cited by respondents, *Pennsylvania v. West Virginia*, 262 U. S. 586; *West v. Kansas Natural Gas Co.*, 221 U. S. 229, dealt with entirely different issues. The former case, however, does recognize that the words "natural gas" themselves have the broad meaning respondents would limit, for it states at p. 586: "Natural Gas is found at pronounced depths in porous strata—usually sand rock—constituting a natural reservoir . . .", just like the natural gas in the present case.

III. The Effect of the Earlier Decision of the Court of Appeals for the District of Columbia Circuit.

The Court of Appeals below did not find that the earlier decision of the Court of Appeals for the District of Columbia Circuit in this litigation foreclosed its consideration of the merits of the jurisdictional issue presented to it. However, respondents in their brief to this Court, after arguing the merits, go on to argue that this Court is precluded from considering the merits by the effect of either (1) the finality of the earlier court of appeals decision or (2) the "law of the case" allegedly established by that decision. This argument necessarily assumes that even though this Court should hold as a matter of law, as Petitioner contends, that the Commission has jurisdiction under the Natural Gas Act over transactions identical to that involved in the present case, nonetheless the producer-respondents herein can enjoy special immunity from the exercise of that jurisdiction because of events peculiar to the course of this litigation, even while other bulk sales in place to other interstate pipelines would be subject to regulation. See the Commission proceedings cited on p. 30 of Petitioner's Main Brief, one of which proceedings is the subject of petitions for writs of certiorari at Oct. Term, 1964, Nos. 1024 and 1025. Respondents' argument thus is a highly technical one.

A. Who Are the Parties?

When the Commission reopened the present proceeding on February 19, 1959, to deal with the new proposal of Texas Eastern—involving what respondent Continental has described as a sale of "gas in place" (R. 426)—the only parties to the litigation were Texas Eastern, the Commission and certain intervenors representing consumer interest, including Petitioner and the Public Service Commission of New York. As the producer-respondents have protested strongly (R. 1170) in various pleadings to the Commission (*e.g.*, R. 1062-76) they were not parties to that

proceeding. Yet now, in the face of that fact, they claim the full benefit of the alleged "law of the case" affecting their status, purported to stem from an appeal to the District of Columbia Circuit in which they played no role and were not parties.

Moreover, Petitioner herein was not a party to the proceedings in the Court of Appeals for the District of Columbia.

B. The Issues.

The respondents raise two issues (Resp. Br. pp. 51-58) which actually present two aspects of but a single claim. The first asserts the finality of a decision rendered upon proper appeal under Section 19(b) of the Natural Gas Act, 15 U. S. C. § 717r(b), as to all issues decided expressly or by necessary implication. The second goes to the binding effect of such a decision on remand. In substance both claims assert an identical policy of finality, and merely point to different origins, in the one case statutory and in the other traditional or "common law." Both claims rest on the policy that an issue properly raised, explored and decided by a competent appellate tribunal should generally not be relitigated *de novo* between the same parties in subsequent phases of the litigation. While this principle may be sound in its abstract statement, it has no application to the present proceeding, for the jurisdictional issue herein was not raised before or decided by any tribunal prior to the phase of this proceeding now before this Court which began after the remand by the Court of Appeals for the District of Columbia.

C. What Was Decided in the First Phase of the Present Proceeding?

Any analysis of precisely what has been decided by an appellate tribunal in an earlier stage of litigation must be based on a proper understanding of appellate judicial process and the concepts of holding and dictum. The following

general principles govern any such analysis. In *Vicksberg v. Henson*, 231 U. S. 259, 269, this Court said:

> "It is well settled, however, that a decree is to be construed with reference to the issues it was meant to decide. Graham v. Railroad Company, 3 Wall. 704, 710; Reynolds v. Stockton, 140 U. S. 254; Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496, 507; Haskell v. Kansas Natural Gas Co., 224 U. S. 217, 233."

And again at p. 273:

> "The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it or passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted and what the decree was really designed to accomplish. We cannot agree with the court below or with the majority of the Circuit Court of Appeals that the effect of the former adjudication was to preclude the rights of the parties in the present controversy."

Or, as it was put in *Norfolk & W. Ry. Co. v. Board of Education*, 114 F. 2d 859, 861 (7th Cir. 1940):

> ". . . the intent of an adjudication is to be determined not from mere isolated parts of the opinion but from consideration of all issues submitted and intended to be disposed of, in other words, from what the decree is really designed to accomplish . . ."

And, closer to the present controversy, the District of Columbia Circuit itself has had occasion recently to point out to one of the producer-respondents herein, in response to a similar argument by it, that the Court's descriptive and explanatory comments in prior decisions are not to be seized upon as the "holdings" of those cases simply because their language, taken out of context, would appear

to coincide with the petitioner's argument. In *Public Service Comm. v. FPC*, 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied*, 377 U. S. 963, Continental and others argued that the court, in a prior decision, had held that the Commission lacked power to require refunds of excessive charges collected by gas producers under temporary certificates of public convenience and necessity. The court responded: "As to this we may say initially that *our statement* in *Atlantic Ref. Co. v. FPC*, 316 F. 2d 677, 679 (1963), that there is no mechanism for refund of overcharges under Section 7, *is not a holding* that a refund may never be required when a permanent certificate takes over from a temporary one, *an issue not there considered.*" (Italics supplied.) The District of Columbia Circuit's "statement", relied on by petitioners here as establishing "the law of the case", clearly was not the "holding" of its decision in *Public Service Comm'n v. FPC*, 287 F. 2d 143 (D. C. Cir. 1960), either. The issue here presented was "not there considered". The failure of respondents to take the present appeal back to the District of Columbia Circuit, the Circuit which, according to their brief, had "expressly held that the Commission has no jurisdiction over the Assignors' conveyance" (Resp. Br. p. 24) and would be most familiar with that "law of the case" if it really existed, suggests a less than complete confidence in what that court in fact "expressly held."

With the above principles of judicial process in mind one can turn instructively to the facts of the present case.

When each of the producer-respondents filed a notice of withdrawal of its certificate application in the earlier phase of the proceeding, in order to avoid litigation on the initial price issue (R. 1014-18), none sought or obtained a disclaimer of further Commission jurisdiction in the matter. Therefore, producer-respondents' withdrawal was not based on any Commission ruling or determination as to their jurisdictional status, but solely upon their own untested assumption on the subject.

None of the parties before the Commission in the earlier phase of the proceeding which culminated in Opinion No. 322 raised any jurisdictional issue.[2] Nor did the Commission decide the issue *sua sponte* in Opinion No. 322. That entire opinion (R. 446-67) as well as the express findings therein (R. 464-65) will be searched in vain for any advertence to or resolution of a question of the jurisdiction of the Commission under § 1(b) of the Act over the sales by producer-respondents. *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, for example, is not even cited in Opinion No. 322.

The passage in that opinion upon which respondents apparently rely for their statement (Resp. Br. p. 51) that the Commission "held in its Opinion No. 322 that it had no jurisdiction over the conveyance of Rayne Field leases" is found at R. 456:

> "*Texas Eastern* has not filed an application for a certificate authorizing the *acquisition* of the Rayne Field leases and we have no authority to issue such a certificate." (Emphasis supplied.)

The statement refers only to *Texas Eastern* and asserts that pipelines need not apply for certificates to *acquire* gas and the Commission has no power to grant such certificates.[3] In short, while obviously the Commission did not at that time *exercise* jurisdiction over the subject transaction, it never, by declaratory order or otherwise, dealt with the issue of jurisdiction in any way. Compare *Colum-*

2. It must be recalled that Opinion No. 322 was issued at the height of the former Commission's erroneous policy of certificating out-of-line prices. All these certificates, including the subject one, were subsequently reversed. *E.g. Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378. Since the Commission was then erroneously prepared to approve on its face the present transaction on the merits, it could hardly have been expected to bring in the absent producer-respondents in order to hand them certificates they had not sought, to carry out their arrangement.

3. The Commission's jurisdiction extends to the sale of gas and the construction of facilities. 15 U. S. C. §§ 717 and 717f.

bia Fuel Corp., 2 FPC 200 (1940) and *Phillips Petroleum Corp.*, 10 FPC 246 (1951), *rev'd*, 347 U. S. 672, in each of which the Commission made entirely explicit its disavowal of jurisdiction over certain sales and square review of such holding, therefore, was possible.

The foregoing discussion of Opinion No. 322 actually disposes of respondent's contentions, since the Court of Appeals could hardly have decided *sua sponte* a complex factual issue not even adverted to by the administrative decision it was reviewing. But to further underline the groundlessness of respondents' "law of the case" argument, it is only necessary to examine in conjunction the New York Commission's "Application for Rehearing" of Opinion No. 322 (R. 467-75) and the "Statement of Questions Presented" in the brief of the then-respondent Federal Power Commission to the District of Columbia Circuit in the earlier appeal herein (R. 1182-83). Neither raises in any way the issue of the Commission's jurisdiction under § 1(b) of the Act over the sales by producer-respondents. Section 19(b) of the Natural Gas Act provides:

> "No objection to the order of the Commission shall be considered by the [reviewing] court unless such objection shall have been urged before the Commission in the application for rehearing . . ." 15 U. S. C. § 717r(b).

The application of the New York Commission raised no jurisdictional issue and the Court of Appeals was therefore deprived of jurisdiction for considering or deciding any. *Pan American Petroleum Corp. v. FPC*, 268 F. 2d 827, 830 (10th Cir. 1959); *FPC v. Colorado Interstate Gas Co.*, 348 U. S. 492. Its passing statements on the issue are therefore necessarily dictum, binding in no way on either the Commission on remand or upon this Court.

D. Effect of the Mandate of the District of Columbia Court.

In reviewing Opinion 322 and remanding for further proceedings the District of Clumbia Circuit said:

> "Two courses are open to the Commission. It may, by clarification of the order presently under review, expressly disclaim any approval of the price to be paid for natural gas by the applicant. See Kansas Pipe Line and Gas Co. et al., supra note 4. Or it may reopen the record in the certificate proceeding to permit Texas Eastern to establish by adequate evidence that the acquisition costs which it proposes to incur will be consistent with the public convenience and necessity." 287 F. 2d at 146; R. 867.

The case was remanded "for further proceedings not inconsistent with the opinion of this court." *Ibid.*

A reading of the respondents' brief to this Court (Resp. Br. pp. 52, 54-58) and the strong reliance placed therein upon the earlier mandate might lead the unwary to conclude that all respondents had been parties to that appeal and had been victorious. In actuality, of course, only respondent Texas Eastern was an intervenor-respondent in the earlier appeal, and far from winning, Texas Eastern saw the District of Columbia Circuit accept every contention of the petitioner, The New York Commission, and reverse a Commission order favorable to Texas Eastern.[4] In remanding, the court pointed out the possible

4. Since the New York Commission was victorious in the District of Columbia Circuit, it could not seek review of that Court's decision by this Court merely to erase language in the opinion it might not be satisfied with. Moreover the position of the New York Commission was that it could achieve its relief even if there was no jurisdiction over the transaction. It did contend, however, on remand that the transaction was jurisdictional (R. 723-724).

courses of action open to the Commission in dealing with *Texas Eastern* and only Texas Eastern.[5]

The thrust of respondents' argument is that the Commission's exercise of jurisdiction over producer-respondents is "inconsistent" with the mandate relating to Texas Eastern. The fallacy of this reasoning is highlighted by the simple fact that it is Texas Eastern and the producers who are now challenging the action of the Commission, not the New York Commission, the victor in the former appeal. No action or order of the Commission in regard to *Texas Eastern* is in any way inconsistent with thrust of the decision of the District of Columbia Circuit (which relied heavily on this Court's decision in *Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378) that the Commission could not abdicate its statutory duty to effectively regulate the subject transaction in the public interest. (See R. 980-81.) The Commission's exercise of jurisdiction over the producers, far from being "inconsistent" with that mandate, goes far to make it more effective, since it ensures continuing effective regulation of the transaction without the pitfall present in the exercise of jurisdiction over Texas Eastern alone—that unforeseen latent excess costs must necessarily fall on either the consumer or Texas Eastern's stockholders.

CONCLUSION.

For the foregoing reasons, respondents' arguments as to "finality" and "law of the case" are groundless, and the Commission properly considered on the merits the issue of jurisdiction over the producer-respondents. For

5. One can imagine the reaction of the absent producer-respondents and the claims of deprivation of due process (compare R. 1170) had the District of Columbia Circuit in fact done what respondents now claim it has done; that is, decided the issue of how the Commission should deal with the transfer by producer-respondents—but decided it in such a way that the court affirmatively ordered the Commission to regulate the producers!

the reasons set forth in Petitioner's original brief to this Court the Commission's decision on that issue was correct. Therefore this Court should reverse the decision of the Court of Appeals for the Fifth Circuit and grant the relief requested in Petitioner's original brief.

Respectfully submitted,

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